



DECISION COVER SHEET

☒ ACTION BY: Public Members Only

☐ ACTION BY: All Members

To : BOARD MEMBERS

Date: July 11, 2013

From : ADMINISTRATIVE LAW JUDGE: Anthony M. Skrocki

CASE: D&A AUTOMOTIVE GROUP, O.C. GENUINE SCOOTERS OF SANTA ANA v. GENUINE SCOOTERS
Protest No. PR-2355-12

D&A AUTOMOTIVE GROUP, O.C. GENUINE SCOOTERS OF TUSTIN v. GENUINE SCOOTERS
Protest No. PR-2356-12

TYPE: Vehicle Code section 3062 Establishment

Motion to Dismiss Protest: This motion was filed by Genuine Scooter due to the failure of Protestants to comply with their discovery obligations.

Vehicle Code section 3050.2(b) provides in part: "...**The executive director may, at the direction of the board, upon a showing of failure to comply with authorized discovery without substantial justification for that failure, dismiss the protest** or petition or suspend the proceedings pending compliance. ...") (Emphasis added.)

Findings of the ALJ: The ALJ found that the elements of Section 3050.2(b) were satisfied in that:

1. There was a "failure to comply with authorized discovery" by Protestants;
2. The failure was material; and
3. Protestants had no "substantial justification for that failure".

Recommendation of the ALJ: The ALJ has recommended that the Executive Director obtain "direction of the board" to "dismiss the protest", in accordance with the statutory language.

Request of the Executive Director: The Executive Director concurs in the findings of the ALJ and is requesting the Board direct that the protests be dismissed with prejudice.

PROCEDURE SUMMARY:

- PROTEST FILED ON CALENDAR: December 14, 2012
- MOTION FILED: Respondent's Motion to Dismiss
- COUNSEL FOR PROTESTANT: Terry Tuchman, in Pro Per
- COUNSEL FOR RESPONDENT: Michael J. Flanagan, Esq.
Gavin M. Hughes, Esq.
Law Offices of Michael J. Flanagan

EFFECT OF PROPOSED ORDER:

If the Board grants the request of the Executive Director, the Executive Director will issue an Order of Dismissal with Prejudice and both protests will be dismissed. There will be no hearing before an ALJ of the Board as to the merits of the protests.

SUMMARY OF PROPOSED ORDER:**Failure to participate in a Settlement Conference:**

- On February 28, Mr. Tuchman, dealer principal of Protestants, participated in a pre-hearing conference with the Board's staff during which he and the representative of Respondent, agreed to submit a detailed Settlement Conference Statement and to participate in a Mandatory Settlement Conference before a Board ALJ, scheduled for April 10, 2013. The date, time, and place of the Mandatory Settlement Conference were included in a separate Notice from the Board issued on March 5.
- No Settlement Conference Statement was submitted in behalf of Protestants.
- On April 8, two days before the scheduled settlement conference, Mr. Tuchman faxed the Board a document stating that he could not attend the settlement conference along with a note from a physician stating that Mr. Tuchman could not travel due to a medical condition. The physician's note did not describe the medical condition but Mr. Tuchman stated that he was suffering from Vertigo.
- The ALJ concluded that the failure of Protestants to submit Settlement Conference Statements and the failure of Mr. Tuchman to attend the settlement conference were not sufficient by themselves to warrant dismissal of the protests however, the failures stated above, plus the failure of Mr. Tuchman to provide alternative dates for a settlement conference, after requests by the Board's staff to do so, were indicative of a desire to delay the proceedings before the Board.

Failure to participate in discovery:

- Also on February 28, 2013, the parties, during the pre-hearing conference with the Board's staff, stipulated to a discovery schedule with specific dates by which certain discovery events were required to occur. The stipulated discovery schedule was incorporated into a separate Pre-Hearing Conference Order also issued on March 5.

- The discovery schedule was structured to lead to a tentative date for a merits hearing to commence on July 22, 2013.
- Protestants failed to comply with the authorized and ordered discovery.
- The discovery events Protestants had stipulated would occur by specified dates but which did not occur include the following:
 - Protestants failed to timely file their Requests for Production of Documents.
 - Protestants failed to timely file objections to Respondent's Requests for Production of Documents.
 - Protestants failed to participate in a meet and confer session to attempt to resolve their respective objections to the other's requests.
 - Protestants failed to submit a Statement of Disputed Discovery Requests. (No such document was submitted by Respondent, as there had been no meet and confer session.)
 - Protestants failed to participate in the telephonic conference to rule on the disputed discovery requests.
- Protestants had made inconsistent requests for continuances asserting that time was needed to obtain legal representation. Mr. Tuchman asserted on behalf of Protestants that he had obtained such counsel, but when the Board contacted the named person to inform counsel that a Substitution of Attorneys was needed, the named attorney stated that she was not representing Mr. Tuchman or the Protestants before the Board. She was counsel for Mr. Tuchman and Protestants in a civil suit filed against Respondent. Despite having ample time to obtain counsel for the Board proceedings, Mr. Tuchman has not done so.
- The ALJ found that Vehicle Code section 3050.2(b) is applicable and that the protests should be dismissed.
 - Section 3050.2(b) in part states:

(b) Compliance with discovery procedures authorized pursuant to subdivision (b) of Section 3050.1 may be enforced by application to the executive director of the board. The executive director may, at the direction of the board, upon a showing of failure to comply with authorized discovery without substantial justification for that failure, dismiss the protest...
- This section was found to be applied appropriately by the Board in *Nader Automotive Group, LLC, et al. v. New Motor Vehicle Board* (2009) 178 Cal. App. 4th 1478.
- The ALJ additionally found that the Code of Civil Procedure ("CCP") also applies and its application would also justify dismissal of the protests.
 - The CCP sections include the following:

2023.030. To the extent authorized by the chapter governing any particular discovery method or any other provision of this title, the court, after notice to any affected party, person, or attorney, and after opportunity for hearing, may

impose the following sanctions against anyone engaging in conduct that is a misuse of the discovery process:

...

(d) The court may impose a terminating sanction by one of the following orders:

...

(3) An order dismissing the action, or any part of the action, of that party.

- The definition of “misuse of the discovery process” needed for the imposition of the above sanction is found in CCP section 2023.010, as follows:

Misuses of the discovery process include, but are not limited to, the following:

...

(d) Failing to respond or to submit to an authorized method of discovery.

...

(g) Disobeying a court order to provide discovery.

RELATED MATTERS:

- Related Case Law: *Nader Automotive Group, LLC, et al. v. New Motor Vehicle Board* (2009) 178 Cal. App. 4th 1478.
- Applicable Statutes and Regulations: Vehicle Code sections 507, 3050.1(b), 3050.2(b), 3050.4, and 3062; Code of Civil Procedure sections 2023.010 and 2023.030(d)(3).